

STATE OF MICHIGAN
COURT OF APPEALS

In re Estate of ELIZABETH MARIE WALLO, an
Incapacitated Individual.

WILLIAM JOHN WALLO, Guardian for
ELIZABETH MARIE WALLO, an Incapacitated
Individual,

Petitioner-Appellee,

v

JEFF ALAN and PATRICE BAILEY,

Respondents-Appellants.

UNPUBLISHED
November 8, 2011

No. 295764
Wayne Probate Court
LC No. 2007-723818-GA

Before: FORT HOOD, P.J., and TALBOT and MURRAY, JJ.

PER CURIAM.

Respondents, Jeff Alan (“Alan”) and Patrice Bailey (“Bailey”) (collectively, “respondents”), appeal as of right an order requiring them to return personal property to, or pay fair market value to, petitioner, William John Wallo’s ward, Elizabeth Marie Wallo (Betty), and reimburse her for certain expenses. We affirm.¹

This case arises from the care of the ward, Betty, by the parties, the ward’s children. Petitioner alleged that respondents, the ward’s daughter and her boyfriend, took the ward from

¹ Respondents, appearing in propria persona, submitted a letter to this Court alleging that the ward, Elizabeth Wallo, died “in October of 2009”, and therefore, the “lower court should not and could not” have issued any order of disposition. The exact date of death is not provided. The Michigan Court of Appeals serves as a court of review principally charged with the duty of correcting errors and generally does not address unpreserved issues. *Burns v City of Detroit (On Remand)*, 253 Mich App 608, 615; 660 NW2d 85 (2002). Additionally, respondents failed to present documentary evidence to support their position or file a motion for leave to expand the record on appeal. In light of the lack of supporting documentation, we do not address respondent’s contention. *Id.*

the state, did not properly care for her, and misappropriated her monies and property. Respondents denied the assertions, claiming that they acted in accordance with a valid power of attorney and any disposition of assets was the result of gifts or theft. It was also alleged that petitioner harmed the ward, causing her injuries that resulted in her stay at a rehabilitation facility. After a lengthy bench trial that included testimony from the ward, the probate court orally ruled against respondents on April 24, 2009.² Respondents were ordered to repay monies and return property or the monetary equivalent value to the ward. Respondents appeal as of right.

First, respondents argue on appeal that the probate court did not have proper jurisdiction in this case, and furthermore, the trial court erred in not taking into account findings made by an Oregon court. We disagree.

Jurisdictional issues are reviewed de novo on appeal. *Michigan's Adventure, Inc v Dalton Twp*, 287 Mich App 151, 153; 782 NW2d 806 (2010). "Jurisdiction, when applied to courts, is the power to hear and determine a cause or matter. Jurisdiction lies at the foundation of all legal adjudications." *Bowie v Arder*, 441 Mich 23, 36; 490 NW2d 568 (1992) (internal citations and punctuation omitted). "Probate courts are courts of limited jurisdiction and derive their jurisdiction and power from statutory authority." *In re Martin*, 237 Mich App 253, 255; 602 NW2d 630 (1999). "The valid exercise of the probate court's statutory jurisdiction is *established by the contents of the petition* after the probate judge or referee has found probable cause to believe that the allegations contained within the petitions are true." *In re Hatcher*, 443 Mich 426, 437; 505 NW2d 834 (1993) (emphasis added).

Respondents argue that, at the time petitioner, Betty's son, filed an action for guardianship, Betty was a resident of Oregon, living with Bailey, her daughter, and Alan, Bailey's boyfriend. Therefore, the Wayne Probate Court did not have jurisdiction to appoint a guardian. Respondents conclude that, for this reason, the order for return of personal property should be vacated. We disagree.

First, with respect to the guardianship proceedings, the Estates and Protected Individuals Code, MCL 700.1101 *et seq.*, applies to "[a]n incapacitated individual or minor *in this state*," MCL 700.1301(c) (emphasis added). Pursuant to MCL 700.1105(a), an "incapacitated individual" is "an individual who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause, not including minority, to the extent of lacking sufficient understanding or capacity to make or communicate informed decisions." Finally, the probate court has exclusive legal and equitable jurisdiction over "a proceeding that concerns a guardianship, conservatorship, or protective proceeding." MCL 700.1302(c). In this case, on October 15, 2007, petitioner filed a petition for guardianship of Betty, whom he alleged was an incapacitated individual in this state. Thus, because the petition alleged that Betty was an incapacitated individual present in Michigan, it was not necessary for her to be *domiciled* in the state in order for the probate court to have jurisdiction to appoint a guardian for her.

² This transcript was not submitted with the record on appeal.

On November 13, 2007, petitioner filed a petition requesting that respondents return Betty's personal belongings. EPIC also applies to "[t]he affairs and estate of a decedent, missing individual, or *protected individual* who is domiciled in this state," MCL 700.1301(a) (emphasis added). Once a guardian was appointed, Betty would be considered a protected individual pursuant to MCL 700.1106(v), that is, she was an "individual for whom a conservator has been appointed or other protective order has been made" Thus, if Betty were domiciled in the state, the probate court would then have concurrent legal and equitable jurisdiction to: (1) determine a property right or interest, MCL 700.1303(1)(a); (2) hear and decide a claim by or against a fiduciary or trustee for the return of property, MCL 700.1303(1)(h); and (3) require, hear, or settle an accounting of an agent under a power of attorney, MCL 700.1303(1)(j).

There was no testimony regarding the exact date Betty returned to Michigan, however, according to respondents' objections to the petition for appointment of a guardian for Betty, petitioner brought Betty to Michigan on October 8, 2007, and as noted, the petition for guardianship was filed on October 15, 2007. "Domicile and residence in Michigan are generally synonymous terms and, for purposes not involving insurance law, have been defined as 'the place where a person has his home, *with no present intention of removing*, and to which he intends to return after going elsewhere for a longer or shorter time'." *Dairyland Ins Co v Auto-Owners Ins Co*, 123 Mich App 675, 680; 333 NW2d 322 (1983), quoting *Hartzler v Radeka*, 265 Mich 451, 452; 251 NW 554 (1933). In this case, when Betty testified, she indicated that she never wanted to move to Oregon after moving to Pittsburgh with Bailey, but rather, "I wanted to come back to Michigan." Further, after she was hospitalized in Oregon, Betty informed her son, petitioner, that she did not want to live in Oregon with respondents. Betty answered "yes," when asked if she ever tried to tell anyone that she wanted to go back to Michigan. Sandra Lessman, respondents' housekeeper and Betty's care giver, corroborated this testimony, explaining that, while Betty was in the nursing home in Oregon, Betty told Lessman, "I'm going home. I'm going home. I want to go home." Thus, at the time petitioner filed a petition for the return of personal items, Betty was in Michigan and considered Michigan home. Furthermore, there was no evidence offered to show that Betty had any present intention of leaving Michigan. Thus, Betty was domiciled in Michigan, and the probate court properly exercised its jurisdiction over Betty and her affairs. Respondents' jurisdictional argument is without merit.

Regarding respondents' contention that the probate court violated their due process rights by failing to consider the proceedings in Oregon, we note that respondents never actually moved to admit such information, and therefore, this issue is not preserved for appeal. *City of Detroit v Detroit Plaza Ltd Partnership*, 273 Mich App 260, 291; 730 NW2d 523 (2006). This Court reviews unpreserved evidentiary issues for plain error affecting substantial rights. *Lockridge v Oakwood Hosp*, 285 Mich App 678, 691; 777 NW2d 511 (2009).

In this case, the probate court did, in fact, take note of the out-of-state proceedings. In its order of December 11, 2009, the court stated that it was making "no ruling regarding petitioner's request for payment of [Betty's] credit cards, such matters having already been addressed by two prior stipulations of the parties that resulted in orders entered by this court and *an order of the circuit court in Oregon*." (Emphasis added.) Moreover, it is not clear what respondents hope to gain by introducing pleadings or other information from the Oregon proceedings because Multnomah County Oregon Judge Marilyn Litzenberger dismissed the petition to have Alan appointed guardian and Bailey appointed conservator of Betty. The Oregon court additionally

ordered Alan to turn over funds held for Betty's benefit to Orrin Onken, Betty's attorney in that state. Finally, the Oregon order provided:

All disputes regarding which items of personal property should be returned to Betty [] shall be decided in the fiduciary proceedings regarding [Betty] pending in the State of Michigan. [Alan] shall pay all credit card charges incurred by Betty [], on behalf of Betty [], or in the name of Betty [], prior to her move to Michigan or incurred by Alan while acting as her agent, and shall hold Betty [] harmless therefrom.

Thus, even if the probate court somehow erred in failing to consider proceedings in the Oregon court, respondents cannot show plain error affecting their substantial rights. *Id.*

Respondents next argue that the trial court erred by failing to consider conflicting testimony regarding the number of Precious Moments figurines that Betty owned and basing its decision on facts not in evidence, by asking for 1099 forms previously provided to the court, by ordering the return of cash and personal property, and by requiring restitution of one-third of household expenses. We disagree.

"Following a bench trial, we review for clear error the trial court's factual findings and review de novo its conclusions of law." *Ligon v City of Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007). "The clear error standard provides that factual findings are clearly erroneous where there is no evidentiary support for them or where there is supporting evidence but the reviewing court is nevertheless left with a definite and firm conviction that the trial court made a mistake." *Hill v City of Warren*, 276 Mich App 299, 308; 740 NW2d 706 (2007). Trial courts are generally afforded great deference because they are in a better position to examine the facts. *Id.* The appellant must provide the full record on appeal. *Band v Livonia Assoc*, 176 Mich App 95, 103-104; 439 NW2d 285 (1989). This Court does not consider any alleged evidence proffered by the parties for which there is no evidentiary support. *Id.* at 104. The requirement that all transcripts be produced applies regardless of whether the transcript is directly relevant to the issues raised on appeal. *Nye v Gable, Nelson & Murphy*, 169 Mich App 411, 416; 425 NW2d 797 (1988). This Court will not consider any issue for which the appellant failed to produce the transcript. *PT Today, Inc v Comm'r of the Office of Fin & Ins Servs*, 270 Mich App 110, 151-152; 715 NW2d 398 (2006).

In the present case, respondents did not present a transcription of the trial court's oral ruling following the bench trial. In light of respondents' failure to provide this Court with the factual findings and conclusions of law rendered from the bench, we cannot conclude that the probate court erred. *Id.* However, we note that the issues raised by respondents involved the trial court's resolution of two differing factual versions of events. Specifically, petitioner alleged that respondents wrongfully converted the property of the ward and failed to properly care for her while respondents alleged that any monies expended were for the benefit of the ward and the disposition of property was by gift or theft. It is the function of the trier of fact to resolve issues regarding credibility and intent. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 174; 530 NW2d 772 (1995). When witnesses testify to diametrically opposed assertions of fact, the test of credibility must lie where the system has reposed it – with the trier of fact. *Kalamazoo Co Rd Comm'rs v Bera*, 373 Mich 310, 314; 129 NW2d 427 (1964).

Although we do not have the benefit of the probate court's ruling, it is apparent from the bench trial that the probate court was presented with two opposing versions of events. The probate court had the discretion to believe or disbelieve a witness's testimony even when uncontroverted. *Guerrero v Smith*, 280 Mich App 647, 669; 761 NW2d 723 (2008). Further, the trier of fact is entitled to believe all, part, or none of the testimony from a witness. See *Brown v Pointer*, 41 Mich App 539, 552; 200 NW2d 756 (1972), rev'd on other grounds 390 Mich 346 (1973). Accordingly, we reject respondents' challenge in light of the failure to present the transcript of the probate court's ruling and the fact that the court's ruling was premised on the credibility of the witnesses.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Michael J. Talbot
/s/ Christopher M. Murray